88-1167

Supreme Court, U.S.
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No. 88——

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1988

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DANIEL CONSTRUCTION COMPANY, A DIVISION OF DANIEL INTERNATIONAL CORPORATION,
*Petitioner,*

v.

LOCAL 257, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, *et al.*,
*Respondents.*

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Dated: January 13, 1989

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## QUESTIONS PRESENTED

I. Does an arbitrator's award invalidating terminations of employees at a nuclear power facility, who were terminated for failing to meet the requirements of a nuclear licensee's security procedures mandated by the Nuclear Regulatory Commission, violate public policy when such award is based on the arbitrator's opinion as to whether the licensee's security procedures complied with NRC requirements, or is such a determination within the sole and exclusive authority of the Nuclear Regulatory Commission?

II. Does the absence of a reinstatement order validate an arbitrator's award which otherwise violates a well-defined and dominant public policy?

## PARTIES TO THE PROCEEDING

Other respondents, in addition to those in the caption, are the following:

Local 36, Sheet Metal Workers International Association

Local 513, International Union of Operating Engineers

Local 1185, Brotherhood of Painters, Decorators and Paperhangers of America, AFL-CIO

Local 662, Laborers International Union of North America, AFL-CIO

Local 2, International Brotherhood of Electrical Workers, AFL-CIO

Disclosure Pursuant to Rule 28.1

Daniel International Corporation is a wholly-owned subsidiary of Fluor Corporation, whose stock is publicly traded.

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### OPINION BELOW

The opinion issued by the court of appeals is officially reported at 856 F.2d 1174 (8th Cir. 1988); it is unofficially reported at 109 Lab. Cas. § 10,714 and is reproduced in Appendix A (1a) to this petition. The opinion of the District Court is unreported and is reproduced as Appendix B (23a) to this petition. The arbitrator's decision also is unreported and is reproduced as Appendix E (34a) to this petition.

### JURISDICTION

The panel of the court of appeals issued its opinion September 16, 1988. The petitioner's petition for rehearing *en banc* was denied November 16, 1988. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS AND REGULATIONS INVOLVED

The statutory provisions involved in this case are contained in the Atomic Energy Act of 1954, 68 Stat. 921, as amended, 42 U.S.C. §§ 2011 *et seq.* Pertinent provisions referenced in this petition are set forth in Appendix G (174a). The regulations of the Nuclear Regulatory Commission involved are contained in 10 CFR Parts 50 and 73. Pertinent sections referenced in this petition are set forth in Appendix H (184a).

## STATEMENT OF THE CASE

This case involves the termination of 140 construction workers who failed the screening procedures required for employees seeking unescorted access to a nuclear power plant. The issues are: (1) whether an arbitrator's award invalidating these terminations is the type of public policy violation that courts should refuse to enforce; and (2) whether a reviewing court should accept and be bound by an arbitrator's finding that a particular screening procedure is invalid under Nuclear Regulatory Commission (NRC) standards rather than rejecting the finding on the basis that such determinations are properly made by the NRC only. This action was brought by the petitioner under § 301 of the Labor Management Relations Act, 29 U.S.C. § 185, to vacate such an arbitrator's award.

The petitioner, Daniel Construction Company (Daniel), is engaged in various construction projects throughout the United States. At the time this dispute arose in 1984, Daniel was engaged as a general contractor in the final phases of construction of a nuclear powered electric generating station for Union Electric Company in Callaway County, Missouri. Union Electric is a nuclear licensee and thus is subject to regulation by the NRC. 42 U.S.C. § 2133, § 2232 (1976). Daniel and its subcontractors were parties to a collective bargaining agree-

ment with various building trades unions covering the employees involved in this case.

As a condition of licensing, the NRC required Union Electric to develop a comprehensive security plan for the Callaway plant and to demonstrate the plan's effectiveness by implementing it for a trial period prior to loading fuel. *See* 10 C.F.R. 73.55(d).

NRC requirements in effect at the time mandated that the comprehensive security plan include screening of all employees and applicants in an attempt to eliminate those who are potentially prone to aberrant behavior. *See* 10 C.F.R. 73.55. Each utility was required to submit a security plan containing screening procedures appropriate for its facility but which, at a minimum, met published industry standards. The appropriate minimum industry standard in 1984 was the "American National Standard: Security for Nuclear Power Plants" (ANSI/ANS-3.3-1982) developed by the American National Standards Institute. One part of this standard required a psychological evaluation by "reliable and valid written personality test or other professionally accepted clinical assessment procedure." A clinical examination was not required. (172a).

Union Electric contracted with IPAT (The Institute for Personality and Ability Testing), an internationally known, independent psychological evaluation service to develop the required test. The procedures developed included a test battery for Union Electric's plant operators and other employees and a shorter version of the same test battery for the employees of contractors.[1]

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[1] A number of contractor-employees were exempt from psychological testing under a provision of the security plan which permitted supervisors to certify reliability and stability for employees with three years of uninterrupted employment. A contractor could also use its own test, provided it met the ANSI standard and was approved by Union Electric.

The test battery for contractor-employees eventually became the central issue of this case. Over 4,000 construction employees were subject to screening. "Unescorted access" was denied to approximately 300 who were then terminated at Union Electric's direction. Union grievances challenged numerous aspects of the screening procedure. The issue presented in this petition arose when the arbitrator, despite Daniel's objection that he was exceeding his authority, ruled that the psychological test battery did not have sufficient validity to meet the NRC's standard for such tests.

Specifically, the arbitrator held, as a finding of fact, that the IPAT test battery—although it was "reliable"—was not sufficiently "valid" to comply with ANSI/ANS-3.3-1982, and, by implication therefore, with NRC requirements. In other words, he concluded that the degree of accuracy with which the IPAT test battery distinguished between desirable and undesirable individuals was not high enough to satisfy the arbitrator that the test was "valid." He further concluded that because, in his view, the test did not meet NRC standards, the employees who were terminated had not been given a "reasonable" test. Therefore, he found their terminations were not for "just cause" and that under the contract the employees had been improperly discharged.

Daniel filed this action in the Western District of Missouri seeking to set aside the arbitration award on the grounds that it violated public policy and did not draw its essence from the collective bargaining agreement. The unions counterclaimed for enforcement of the award. The district court entered an order enforcing the award in an unreported opinion. On appeal, the Eighth Circuit affirmed the district court in a divided opinion. 856 F.2d 1174. Senior District Court Judge Ross dissented on the ground that the award violated the public policy that the

NRC maintains control over the regulation of safety procedures during the construction of a nuclear power plant to protect the health and safety of the general public:

> There is no question but that to allow an arbitrator, who has no apparent experience or expertise in the fields of nuclear safety or psychological testing, to second-guess the validity of security procedures which have been approved by the NRC would thwart such a public policy.

856 F.2d at 1184.

Both the majority and dissenting opinions in the court of appeals make it unquestionably clear that when he rejected the IPAT test battery the arbitrator inserted his views into areas of public safety and national security normally reserved for the NRC. The majority acknowledged that the arbitrator found that "Daniel violated ANSI and therefore NRC standards" and accepted those findings. 856 F.2d at 1183. The majority opinion also states:

> Here, no question exists but that public policy requires that unstable employees be denied access to sensitive areas of a nuclear power plant. The contract, the arbitrator's award, the position of the parties, all support that principle. . . . .

*Id.*

Two aspects of the case were critical to the majority opinion. The first relates to the NRC's review of the test battery. The majority believed that the NRC must have specifically approved the test in question in order to bring public policy into play. 856 F.2d at 1182. Only the NRC knows the exact extent to which it subjected this test battery to review before approving Union Electric's comprehensive security procedure. Even though the opinions in the court below disagreed as to the significance of these facts, it is established that the NRC specifically asked to see at least one version of the test, knew that

different procedures were frequently used for contractor-employees, and observed the administration of the test to contractor-employees. (856 F.2d at 1177 n. 7, majority opinion; 856 F.2d at 1183 n. 1 and 2, dissenting opinion.) In any event, approval of the test procedure is encompassed in its approval of the security procedures which is implied by its grant of a license.

The second aspect is purely a function of time. When the arbitrator's decision was issued about two years after these terminations, construction work was complete. Therefore, the normal remedy of reinstatement was not available and only backpay was awarded. The lack of a reinstatement order is one of the primary factors cited by the Eighth Circuit for distinguishing its previous decision in *Iowa Electric Light & Power v. Local Union 204*, 834 F.2d 1424 (8th Cir. 1987). In distinguishing *Iowa Electric* the majority stated:

> Daniel relies heavily on *Iowa Electric* as well as other cases which have held an arbitrator's decision violative of public policy, where the safety of the general public was implicated. A key difference in this case, however, is that no public safety concerns are implicated by the arbitrator's award of backpay, as opposed to an order returning a potentially dangerous employee to the workplace. (Footnotes omitted)

*Id.* This factor appears to be essential to the majority rationale. The court ignored what future impact this case might have, and concluded that an arbitrator's award could not be set aside except in case of immediate danger to the public.

The petitioner's Petition for Rehearing En Banc was denied without an opinion, with three judges dissenting. Daniel now seeks review of the court of appeals decision refusing to set aside the arbitration award.

## REASONS FOR GRANTING THE WRIT

This case raises critical questions concerning whether an arbitrator may, consistent with public policy which vests nearly all issues concerning nuclear safety with the NRC, effectively set aside portions of a security plan which a nuclear licensee has adopted pursuant to NRC requirements and which plan has itself been reviewed by the NRC. In short, the issue is whether the adequacy of a psychological evaluation procedure adopted pursuant to NRC requirements is a question for the NRC or for a private arbitrator appointed pursuant to a collective bargaining agreement. The arbitrator's award raises significant issues concerning the interplay between the federal policy of deferral to arbitration under collective bargaining agreements and the federal policy delegating issues of nuclear safety to the Nuclear Regulatory Commission. This constitutes an important question of federal law which has not been, but should be, settled by this Court.

This case also raises important questions of federal law left unanswered in this court's recent decision in *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. ——, 108 S.Ct. 364, 98 L.Ed.2d 276 (1987), *i.e.*, whether in order to be vacated on ground of public policy, an arbitrator's award must violate "positive law" and, if not, to what extent must an "explicit public policy" be "well defined and dominant." 108 S.Ct. at 373.

### I. THE ARBITRATOR VIOLATED PUBLIC POLICY WHEN HE TOOK IT UPON HIMSELF TO DETERMINE WHETHER PART OF A NUCLEAR LICENSEE'S SECURITY PLAN, WHICH HAD BEEN REVIEWED BY THE NUCLEAR REGULATORY COMMISSION, COMPLIED WITH THE NRC STANDARDS FOR SITE ACCESS SCREENING.

The arbitrator exceeded his authority and violated public policy by deciding whether Union Electric's security plan complied with the NRC's standards for site access

screening. The arbitrator infringed on the NRC's exclusive domain when he concluded that he, rather than the NRC, should decide whether the plan was consistent with NRC standards.

The arbitrator's award violates a well-defined and dominant public policy of the United States that the NRC maintain control over security matters during the construction of a nuclear power plant. This policy is founded on obvious concerns for the safety and health of the general public. Congress has provided and this Court has held that the NRC has "exclusive authority" to regulate nuclear site safety and security in order to protect the public health and safety. *Pacific Gas v. State Energy Resources*, 461 U.S. 190, 212 (1983). ("The federal government has occupied the entire field of nuclear safety concerns, except the limited powers expressly ceded to the states.")

Normally, unless an arbitration award does not "draw its essence from the collective bargaining agreement, a court is bound to enforce the award and is not entitled to review the merits of the contract dispute." *W. R. Grace & Co. v. Local 759, Int'l. Union of the United Rubber, Cork, Linoleum and Plastic Workers of America*, 461 U.S. 757, 764 (1983), *quoting United Steelworkers of America v. Enterprise Wheel and Car Corp.*, 363 U.S. 593, 597 (1960).

This Court has recognized a public policy exception to enforcing arbitration awards. "As with any contract, however, a court may not enforce a collective bargaining agreement that is contrary to public policy." *W. R. Grace & Co.*, 461 U.S. at 766. If the contract as interpreted by the arbitrator violates public policy, a court must refrain from enforcing it. Such a public policy must be "well defined and dominant, and is to be ascertained 'by reference to the laws and legal precedents and not from general considerations of supposed public inter-

ests.' " *Id., quoting Muschany v. United States,* 324 U.S. 49, 66 (1945); *United Paperworkers Int'l. Union v. Misco,* 484 U.S. ——, 108 S.Ct. 304, 98 L.Ed.2d 286 (1987). The issue of public policy is one for resolution by the courts. *W. R. Grace,* 461 U.S. at 766.

As stated above, the issue in this case is whether an arbitrator has the authority to inquire into and rule on questions involving the safety of nuclear power facilities while interpreting a collective bargaining agreement. It is the public policy of the United States that control over security and safety at nuclear power electric generating sites is completely reserved in the Nuclear Regulatory Commission. Any encroachment into this area by an arbitrator would violate that public policy. The circuit court erred in failing to vacate an award by an arbitrator that runs contrary to this well-defined and dominant public policy. *W. R. Grace & Co., Id.*

The Congress in the Atomic Energy Act has stated that atomic energy and the facilities used in connection therewith shall be subject to regulation by the United States in order "to assure the common defense and security and to protect the health and safety of the public." 42 U.S.C. § 2012(e) (1976). Commercial nuclear power facilities like Union Electric's Callaway plant are specifically regulated by the NRC, which was created for such oversight authority by 42 U.S.C. § 5841 (1976). The Office of Nuclear Safety and Safeguards within the NRC is charged with responsibility in the licensing and regulation of nuclear facilities for "provision and maintenance of safeguards against threats, thefts, and sabotage of such licensed facilities, and materials." 42 U.S.C. § 5844 (b)(1) (1976). The NRC is authorized to issue commercial licenses for the use of nuclear power pursuant to 42 U.S.C. § 2133 (1976).

Likewise, 42 U.S.C. § 2232 (1976) specifies the requirements of license applications and authorizes the NRC to

establish rules and regulations to assure that the use of nuclear power will be in "accord with the common defense and security and will provide adequate protection to the health and safety of the public." The NRC has an even broader mandate under 42 U.S.C. § 2201(b) (1976) to "establish by rule, regulation, or order such standards and instructions . . . as the Commission may deem necessary to promote the common defense and security or to protect the health or to minimize danger to life or property."

These statutes clearly indicate that the NRC has the sole and exclusive responsibility to regulate nuclear power facilities in the United States so as to assure the common defense and security and to protect the health and safety of the public. The courts have consistently upheld the view that the NRC has exclusive authority over the security and safety aspects of nuclear power. *Pacific Gas, supra; Northern States Power Co. v. State of Minnesota*, 447 F.2d 1143 (8th Cir. 1971), *aff'd mem.*, 405 U.S. 1035 (1972). This Court, early in the development of commercial uses of nuclear power, in *Power Reactor Development Co. v. Int'l. Union of Electrical, Radio and Machine Workers*, 367 U.S. 396, 404 (1961), recognized the principle that Congress "clearly contemplates that the Commission shall by regulation set forth what the public safety requires as a prerequisite to the issuance of any license or permit under the Act." [2]

In cases concerning the preemption of state authority in the nuclear field, this Court has adhered to the view that "the Federal Government maintains complete control of the safety and 'nuclear' aspects of energy generation" and that the NRC has sole authority over regulation of the safety and public health aspects of nuclear power. *Pacific Gas and Electric Co. v. State Energy*

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[2] Commission referred to is the Atomic Energy Commission, the predecessor agency to the NRC.

*Resources Conservation and Development Commission*, 461 U.S. at 212. Other courts have recognized this as well. The "regulatory scheme . . . is 'virtually unique in the degree to which broad responsibility is reposed in the [NRC]. . . .'" *Carstens v. NRC*, 742 F.2d 1546, 1551 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1136 (1985). (Quoting *Siegel v. Atomic Energy Commission*, 400 F.2d 778, 783 (D.C. Cir. 1968)). The Eighth Circuit has stated: "Nothing could be plainer than the public interest in the safe operation of nuclear power plants that underlies this panoply of federal regulations." *Iowa Electric Light & Power v. Local Union 204*, 834 F.2d at 1428.

Although the NRC's control over nuclear security matters is exclusive, it is not unreviewable. Congress has explicitly provided that affected persons may challenge NRC actions through administrative proceedings before the agency, subject to review by the courts of appeals. 42 U.S.C. § 2239. However, the district courts (much less private arbitrators) do not have jurisdiction to determine compliance with NRC standards. *Simmons v. Arkansas Power & Light Co.*, 655 F.2d 131, 133 (8th Cir. 1981); *Susquehanna Valley Alliance v. Three Mile Island*, 619 F.2d 231, 238 (3d Cir. 1980), *cert. denied*, 449 U.S. 1096 (1981); *Honicker v. Hendrie*, 465 F. Supp. 414 (M.D. Tenn.), *aff'd. on basis of district court's opinion*, 605 F.2d 556 (6th Cir. 1979), *cert. denied*, 444 U.S. 1072 (1980).

Indeed, in proceedings concerning the Callaway County nuclear plant, the Missouri Public Service Commission has held that "the issue of radiological health and safety is within the exclusive jurisdiction of the federal government," a position with which the Missouri Court of Appeals agrees. *State ex rel. Utility Consumers Council v. Public Service Commission of Missouri*, 562 S.W. 2d 688 (Ct. App. Mo. 1978). In refusing a request to remand

the case to the Public Service Commission for further evidence regarding the economic impact of nuclear accidents on the overall cost of the nuclear power plant, the court noted, ". . . neither the Commission nor this court has the authority to determine that the construction of a nuclear generating facility in Callaway County is safe. The federal government [sic] preempts this issue. . . . This issue of safety rests in the exclusive domain of the federal government." 562 S.W.2d at 698.

In explaining its ruling the court referred to *Northern States Power Co. v. State of Minnesota*, 447 F.2d 1143 (8th Cir. 1971), *aff'd mem.*, 405 U.S. 1035 (1972):

> The court there held that the federal government has exclusive authority to regulate the construction and operation of nuclear power plants. . . . The basis for the ruling in *Northern States Power Co.* was that the control of radioactive effluents discharged from the power plant was closely intertwined with the planning, construction and operation of the nuclear facility. Herein lies the distinction in the present case. The federal government regulates how nuclear power plants will be constructed and maintained, the State of Missouri regulates whether they will be constructed. The federal regulations pertain to plans, specifications, safety mechanisms and the like. The Commission's considerations pertain to economic feasibility, need for increased power and financing. It is obvious that the considerations of the State of Missouri do not affect the control of how the nuclear facility will be constructed and physically maintained. (Footnote omitted)

562 S.W.2d at 698

The Public Service Commission recognized that when it was called upon to decide issues which intertwined with safety, it was not empowered to do so and properly

did not. The Public Service Commission certainly had authority to pass on the economic issues concerning the Callaway plant, just as the Minnesota Pollution Control Agency in *Northern States Power* certainly had authority to regulate pollution from power plants within the state. However, in both instances, when the authority of those agencies entered into the area of regulation of the construction and operation of the nuclear facility, they were compelled to defer to the exclusive authority of the NRC or its predecessor.

This principle should also apply in the instant case. The arbitrator, like the Missouri Public Service Commission and the Minnesota Pollution Control Agency, has jurisdiction over a certain area, namely the collective bargaining agreement, although arguably his jurisdiction is much more limited than those agencies. The arbitrator has authority to interpret the collective bargaining agreement, just as the Missouri Public Service Commission has authority to pass on the economic effects of a proposed power plant. But the arbitrator has no more authority to determine whether the psychological screening procedure used at the Callaway plant complies with NRC standards than did the Missouri Public Service Commission have to determine whether the nuclear facility will be safely constructed and maintained.

The NRC has promulgated numerous guidelines, rules, and regulations related to site access to protect the general public from sabotage and other threats to its health and safety. The licensing procedure set forth in these regulations requires the applicant to prepare a Physical Security Plan and a Safeguards Contingency Plan and to protect these plans against unauthorized disclosure. 10 C.F.R. § 50.34(c)-(e). Regulations concerning physical protection of plans and materials are contained in 10 C.F.R. Part 73. The purpose of this section is to design safeguard systems to protect against acts of radiological sabotage and to prevent the theft or diversion of

nuclear materials. 10 C.F.R. § 73.1. A nuclear licensee is required to develop a physical security plan whereby the utility will control personnel and vehicle access to protected areas of the plan. 10 C.F.R. § 73.55(d). Only individuals with authorized access may obtain entrance to protected areas without an escort. *Id.*

In furtherance of this policy, the NRC determined that in order to have unescorted access to protected areas in a plant, a person must have demonstrated his "reliability and stability" through various procedures outlined by the NRC. Reliability and stability were to be determined in part through screening programs which met the standards of the American National Standards Institute covering "industrial security for nuclear power plants" (170a). These guidelines provided that the screening program contained various checks to determine the trustworthiness and reliability of the individual, including a psychological evaluation:

> Psychological Evaluation. Reliability and stability shall be indicated by the results of a reliable and valid written personality test or by other professionally accepted clinical assessment procedure administrated by or under the supervision of a licensed psychologist or psychiatrist cognizant of this standard.

(172a). This requirement was, therefore, the standard under which NRC operated at the time the tests in question were administered.

At the time the grievants were discharged in 1984, the Union Electric site security plan contained a commitment to the NRC that unescorted access would be granted only if an individual had successfully completed a psychological evaluation of the type described in ANSI/ANS-3.3-1982. The Union Electric site security plan contained the procedure for screening contractor employees for unescorted access which gave rise to this litigation.

The NRC has elected, through regulations issued consistent with the statutory mandate, to impose ultimate authority for site security upon the licensee/owner with oversight authority remaining in the NRC. *See World Airways, Inc. v. Int'l Brotherhood of Teamsters, Airline Division*, 578 F.2d 800 (9th Cir. 1978) (FAA placed duty to determine pilots' judgmental capabilities solely on carrier. Arbitration award vacated.) Union Electric developed its site security plan in accordance with NRC guidelines and received approval of that plan through the NRC licensing process. At the time nuclear fuel was brought on site, it was the duty and responsibility of Union Electric to exclude anyone who exhibited tendencies of aberrant behavior as demonstrated through the approved psychological testing instruments. These individuals were excluded because it was Union Electric's judgment that they might have a propensity to commit radiological sabotage or otherwise might jeopardize the safe operation of the site and the general public. Since the duty and responsibility is solely upon the owner/licensee to make judgments in the area of site security based upon its NRC-approved site security plan, the arbitrator is not free to second-guess both the NRC and Union Electric and conduct his own review of the plan. In concluding that the psychological instruments lacked validity, the arbitrator usurped the responsibility and duty imposed upon Union Electric by the NRC to determine site access requirements.

The clear and emphatic public policy concerning the health and safety aspects of nuclear power facilities is that regulation in these areas is clearly committed to the NRC. This public policy is set forth in statutes, NRC rules and regulations, and the case law. This public policy is, therefore, clearly stated and dominant. In short, Congress preempted any other regulation in this area, including regulation by the states or by arbitrators.

Since the public policy concerning safety and security at nuclear power plants is well-defined and dominant,

this policy must be balanced against the policy favoring arbitration of labor disputes. There are no competing federal labor policy matters at issue here since there was never any agreement to arbitrate the questions decided by the arbitrator. In fact, Daniel insisted at the hearing that the arbitrator had no authority to consider the issues on which he eventually decided the case. Therefore, Daniel has not, in any way, conceded that the arbitrator has the authority to decide the public policy issue it now raises. Secondly, the area of nuclear safety involves a public policy that transcends the dispute between the unions and Daniel and has a direct impact upon the health and welfare of the general public.

## II. THE GRANTING OF A LICENSE BY THE NRC TO A NUCLEAR LICENSEE CONSTITUTES APPROVAL OF THE LICENSEE'S SITE SECURITY PLAN.

In failing to find that the arbitrator's award violated this public policy, the court of appeals erred in two vital respects. First, it apparently assumed that the NRC must have "actually evaluated, expressly approved or otherwise decided that the plan in question [the mini-IPAT] complied with NRC regulations regarding appropriate security screening procedures," 856 F.2d at 1182, before public policy considerations could come into play. Second, it held that it was bound by the arbitrator's finding concerning the validity and reasonableness of the test. In making these assumptions, the court of appeals failed to give full accord to the powers afforded to the NRC.

The court of appeals erred in assuming that in order for the award to be set aside, the NRC must have somehow expressly approved the plan in question. As the dissent points out, the NRC reviewed Union Electric's screening programs and did not voice any objections.[3]

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[3] Even if the NRC had not actually reviewed and approved the psychological exam implemented by petitioner, the NRC did not

It is an undisputed fact that the NRC approved Union Electric's license knowing that Union Electric used the test in question. In fact, according to evidence presented by the unions, the mini-IPAT, the test in question, was still being used by Union Electric at the time of the court of appeal's decision. 856 F.2d at 1183.

There is no requirement that the Nuclear Regulatory Commission place a formal stamp of approval on every separate element of a nuclear licensee's operations. The fact that the license is granted at the very least implies approval of the licensee's programs, including its security program. Under the court of appeal's reasoning, the power of the arbitrator is dependent on the formality of the actions of the NRC. Yet nowhere can it be found in the Atomic Energy Act or the NRC's rules and regulations that an arbitrator is empowered to pass on the efficacy of an aspect of a nuclear licensee's security screening procedure simply because the NRC has not singled out that particular aspect in question for express approval. In fact, the public policy is clearly just the opposite. Approval of the plan and its elements is the

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divest itself of the power to observe and, if necessary, enforce its standards. In *Rushton v. Nebraska Public Power Dist.*, 653 F. Supp. 1510, 1514 (D. Neb. 1987), *aff'd* 844 F.2d 562 (8th Cir. 1988), the court observed that the NRC's regulatory role may consist of a more hands off approach, allowing a licensee to promulgate its own plan for meeting NRC standards, a process the NRC will not interfere with unless and until it determines its standards are not being met. There the court said:

> Subject to the continued success of the industry initiatives and the NRC ability to monitor the effectiveness of licensee's programs, the NRC represented that it would refrain from rulemaking on fitness for duty programs for nuclear power plant personnel for a minimum of 18 months. In addition, the NRC stated that use of the policy statement did not effect its ability to issue orders, call enforcement meetings, suspend licensees for significant safety violations, or conduct necessary inspections or other appropriate enforcement activities for failure to satisfy regulatory requirements.

exclusive domain of the NRC. If the question before an arbitrator, or a district court, is whether an aspect of the access screening procedures complies with NRC regulations, and the NRC has not ruled that they do not, the fact finder is in no position to determine that they violate such regulations.

## III. THE COURT IS NOT BOUND BY THE ARBITRATOR'S FINDING OF FACT WHEN THE ARBITRATOR IS NOT ENTITLED TO MAKE SUCH FINDINGS.

Likewise, the court erred when it felt it was bound by the arbitrator's finding that the test did not comply with NRC requirements. While it is true that normally a court is required to take the facts as an arbitrator finds them, it should not do so in a case such as this, where the underlying issue is whether the arbitrator is the proper fact finder in the first place. *See Carpenters' Local Union No. 1478 v. Stevens*, 743 F.2d 1271 (9th Cir. 1984) (court need not defer to factual findings if decision violates law or well-defined public policy). In effect, the court of appeals has abdicated its authority to determine whether the underlying issue is arbitrable. This is, of course, a matter for the courts. *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 583 n.7 (1960). If a person were to challenge in district court the adequacy of a nuclear licensee's security plan, including its psychological evaluation program, it is clear that the district court would have no authority to pass on the adequacy of the plan. Such challenges must be brought before the NRC itself. 42 U.S.C. § 2239; *Simmons v. Arkansas Power*, 655 F.2d at 133. How then, may the court accept an arbitrator's findings on the same issue as true? It can no more assume that the psychological test in question is faulty because an arbitrator so determines, than it can determine so itself. It is for the NRC to make that determination, not the courts—and certainly not an arbitrator.

The inconsistency of the arbitrator's award and the federal policy that the NRC should have exclusive control in determining what meets its standards is highlighted by the fact that the arbitrator's determination of the invalidity of the test applied only to the employees who were covered by the collective bargaining agreement. Numerous management, clerical, and other personnel employed by Daniel were not covered by the collective bargaining agreement, but also had to take the test in question and pass the other security requirements. Thus, two groups of employees working at the same nuclear facility would, under the arbitrator's theory as endorsed by the court of appeals, be subjected to differing standards in administering the tests, one of which meets the criteria of the nuclear licensee under the auspices of the NRC and the other of which meets those of the arbitrator. The nonunion employees of Daniel could not sue in state or federal court claiming that the test did not comply with NRC requirements. Their arguments must be addressed to the NRC. As a matter of consistent federal nuclear and labor policy, the same should be true for those employees covered by a union contract.

## IV. THE ARBITRATOR'S AWARD VIOLATES PUBLIC POLICY DESPITE THE ABSENCE OF A REINSTATEMENT ORDER.

The court of appeals also mistakenly assumed that no public safety concerns are implicated by the arbitrator's award of backpay, as opposed to an order returning a potentially dangerous employee to the workplace. While it is true that the fortuitous fact that the project was completed prior to the arbitrator's award prevented the arbitrator from ordering reinstatement of the affected employees, it does not follow that considerations of public safety are not affected by this award. Nuclear licensees, and their contractors, are entrusted with heavy responsibilities for the public welfare and safety under

the guidance of the NRC. Congress has vested the NRC with the sole authority to pass on the adequacy of their security procedures. It has made no provision for other tribunals to determine their adequacy. This should be contrasted with *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984). There this Court found clear indications that Congress intended that states could afford tort remedies for nuclear accidents. Absent such indications, the NRC has preempted the area. No such indications are present in this case. The reason this is so is obvious. If outside parties were able to challenge the licensee's practices through arbitration or channels other than the NRC, nuclear licensees would inevitably be distracted from their overriding safety concerns placed upon them by the Atomic Energy Act and the NRC into attempting to mollify outside parties in order to avoid litigation. For example, if a nuclear licensee anticipates that it may have to justify seemingly harsh aspects of its security program to outside arbitrators instead of solely to the NRC, it may well be tempted to convince the NRC to accept a security program that is less restrictive and perhaps less effective.

The court of appeals analysis is functionally identical to the question of whether only a "positive law" violation justifies setting aside an arbitrator's award—the question this Court reserved in *United Paperworkers Intern. Union v. Misco, Inc., supra.* Reinstatement in this situation would have been equivalent to a violation of "positive" law because the NRC standard clearly permits granting unescorted access only to employees whose "reliability and stability have been demonstrated" by an appropriate psychological evaluation. There was no such demonstration of either reliability or stability for these grievants. By limiting its review to cases where an arbitrator's award would require an employer to violate the law, the court erroneously construed the public policy exception referred to in *W.R. Grace & Co.* The court

failed to recognize that its duty to uphold public policy extends beyond an immediate treat to public safety and national security and should have been exercised in this case. It extends to public policy designed to protect from outside interference an area which Congress intended to be uniformly governed by a single agency. *See Northern States Power Co. v. State of Minnesota*, 447 F.2d at 1154.

Neither a state agency, a state legislature, nor even a federal district court would have the authority to rule on the validity of this or any similar NRC required screening procedure. Even so, the Eighth Circuit majority felt bound by an arbitrator's finding of fact. The majority opinion exhibits a mistaken view of prior opinions of this Court, including the *Steelworkers Trilogy*[4] and others. The majority opinion permits a private labor arbitrator, who has no expertise in nuclear security, to rule on matters vitally affecting the health and safety of the public at large. This Court has the opportunity in this case to restore the respect accorded the arbitration process by defining the limits on an arbitrator's ability to affect the public in what should be the private resolution of a contractual dispute.

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[4] *United Steelworkers of America v. American Manufacturing Co.*, 363 U.S. 564 (1960); *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

## CONCLUSION

For the foregoing reasons, a writ of certiorari should be issued to review the jurgment of the Court of Appeals and its judgment should be reversed.

Respectfully submitted,

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